Filed 5/17/07 P. v. Andrade CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GUILLERMO ANDRADE,

Defendant and Appellant.

2d Crim. No. B190264
(Super. Ct. No. 2005032334)
(Ventura County)

Appellant Guillermo Andrade was charged by information with felony resisting an executive officer by threat or violence (Pen. Code, § 69),[1] felony false imprisonment (§ 236), misdemeanor battery (of cohabitant) (§ 243, subd. (e)(1)), and misdemeanor child cruelty by endangering health (§ 273a, subd. (b)).

At the close of testimony, the People moved to dismiss the charge of felony resisting an officer (§ 69) and amend the information to include a misdemeanor charge of resisting arrest. (§ 148.) The court granted the motion.

The jury found appellant guilty of misdemeanor battery (Pen. Code, § 243, subd. (e)(1)) and misdemeanor child cruelty by endangering health (§ 273a, subd. (b)). The trial court suspended imposition of sentence and placed appellant on formal probation for 48 months. As a condition of probation, appellant was required to serve 45 days in

[1] All statutory references are to the Penal Code unless otherwise stated.

county jail.[2] Appellant alleges the court committed instructional error by failing to adequately define the terms "care or custody" and erred by using the CALJIC, rather than CALCRIM, jury instructions. We affirm.

FACTS

Michelle G. and appellant had been dating for eight years and have a three-year-old son, J. At the time of the offense, they were living apart, and Michelle and J. had moved in with Michelle's mother.

Appellant and Michelle are unmarried, thus there is no court-ordered custody or visitation. Appellant did not support Michelle or J. Although there was no formal custody arrangement, Michelle allowed appellant "to have custody of [J.] during this time period." Michelle periodically permitted appellant to take J. away from the house.

On the morning of the offense, appellant telephoned Michelle and they began arguing about J. Michelle hung up and appellant appeared at her residence 20 to 30 minutes later. He approached Michelle, who was standing at the top of a staircase, and demanded their son. Michelle refused, grabbed J., and walked into her bedroom. They continued to argue and appellant threatened Michelle and followed her into the room. He attempted to grab J. from her arms, but she resisted and tried to push him away.

Appellant pushed Michelle with his left arm on her right bicep, causing her to fall to her knees. J. fell onto the ground and began crying, but he was uninjured. Appellant grabbed Michelle's hair with both hands and she called out to her brother, who was also in the house, to call the police. Appellant stopped pulling her hair, backed away and apologized. She picked up J. and sat on the bed, where she remained for the next 30 to 45 minutes.

Appellant turned on the television and closed the bedroom door, but did not lock it. He did not touch Michelle again. For about 30 to 40 minutes, appellant paced

[2] Appellant notes that, although the convictions appealed are misdemeanors, the case is properly before us rather than the Appellate Department of the Superior Court. At the time of trial, the case included the felony charges of false imprisonment (§ 236) and resisting an officer (§ 69), and the charges were brought by way of information. (Cal. Rules of Court, rule 8.304(a)(2)(A).)

between the television and the bed. The police arrived and demanded that appellant open the door, but he continued to stare at the television.

Three sheriff's deputies entered the room, along with a police dog. Appellant was standing in the middle of the room, facing the doorway, and had assumed a fighting stance. He ignored their repeated orders to get on the ground. One of the deputies grabbed appellant's arm, and he began resisting. The room was too small to use a baton or pepper spray without injuring Michelle or her child, so the canine handler released his dog and commanded him to bite appellant. The dog bit him four to five times and appellant fell to the ground.

Appellant lay on the ground, face up, and tried to grab the dog's head to push him away. The handler did not call his dog off, but hit appellant with his fist so he would release his hold on the dog. Appellant rolled onto his stomach and placed his hands in his waistband, causing the officers to believe he might have a weapon. At the handler's command, the dog bit appellant twice more. The deputies pulled appellant's hands from his waistband and handcuffed him. No weapons were found.

## DISCUSSION

### *"Care or Custody" of a Child*

"Any person . . . having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor." (§ 273a, subd. (b).) Appellant argues that the trial court gave the jury inconsistent definitions of the terms "care or custody" and erred by following *People v. Cochran* (1998) 62 Cal.App.4th 826, 832.

*Cochran* and its progeny have established that "'[t]he terms "care or custody" do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.'" (*People v. Culuko* (2000) 78 Cal.App.4th 307, 335; *People v. Toney* (1999) 76 Cal.App.4th 618, 621-622; *People v. Cochran*, *supra*, 62 Cal.App.4th at p. 832.)

In *Culuko*, a mother and her boyfriend were convicted of second degree murder, fatal child assault and felony child abuse of mother's infant son. The baby died as a result of a series of injuries, although it was unclear whether they were inflicted by mother, her boyfriend, or both. The court found there was sufficient evidence that the boyfriend had care and custody of the baby based on the facts that he, the mother and baby lived together in one room; the boyfriend took care of the baby, bathed and changed him, gave him a bottle; and, five days before the baby's death, the boyfriend said he was taking full responsibility for caring for him. (*People v. Culuko*, *supra*, 78 Cal.App.4th at p. 335.)

*Cochran* concerned a fatal child assault committed by the mother's boyfriend. There, the mother and her baby moved in with the defendant boyfriend. The court found that the boyfriend had care and custody of the child because he watched and fed her, gave her baths and put her down for naps. (*People v. Cochran*, *supra*, 62 Cal.App.4th at p. 833.)

In *Toney*, a mother married and moved in with the defendant, who manufactured methamphetamine in his house. Mother had a six-year-old son from a previous relationship who visited on weekends. The defendant was subsequently convicted of felony child abuse for exposing the minor to dangerous chemicals used to manufacture the drug. He argued there was no evidence he voluntarily assumed the role of caregiver. We held that the defendant had care and custody of his stepson when he invited him into his home, gave him a room of his own and allowed him to use part of the living room for children's activities. (*People v. Toney*, *supra*, 76 Cal.App.4th at p. 622.)

Appellant argues extensively that *Cochran, supra,* was wrongly decided and urges us not to follow it. He claims that the court's rationale was faulty because it relied on an elder abuse case, *People v. Heitzman* (1994) 9 Cal.4th 189, to interpret the term "care or custody" within the meaning of the child abuse statute.

The elder abuse statute, section 368, defines "caretaker" as "any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult." (§ 368, subd. (i).) In *Heitzman*, an elderly victim lived with his two sons. The victim died of septic shock, caused by malnutrition, dehydration, and neglect.

His daughter was charged with elder abuse because she visited the household regularly and was aware of her father's condition. Our Supreme Court held that the daughter was not a caregiver because she did not have a "special relationship" with her father that would give rise to controlling her brothers' conduct. (*People v. Heitzman*, *supra*, 9 Cal.4th at p. 212.) She could not be penalized under the statute for failing to act where she had no duty to do so. (*Ibid.*)

The *Cochran* court relied on the elder abuse statute to define "care and custody" within the meaning of the child abuse statute. It noted that, since both statutes "were both enacted to protect those who need special protection because of age and vulnerability, we find no special meaning to the terms 'care and custody' beyond the plain meaning of the terms themselves. The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*People v. Cochran*, *supra*, 62 Cal.App.4th at p. 832.)

*Cochran*, *Culuko* and *Toney* all concerned the extent to which a child may be considered to be in the care or custody of an individual who is not a blood relative. By contrast, the facts before us concern a biological father who had continuing contact with his child. Appellant argues that he was not married to Michelle, did not live with her, had neither physical custody nor legal custody of J., and thus bears no criminal liability for child abuse. We disagree.

A parent has a special duty to protect his or her minor child. Application of parental duties as described in dependency law relates to a parent's duty to provide for the necessities of life and refrain from harming the child. (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 572, fn. 7.) Criminal statutes may also embody a common law duty, such as that imposed on parents to care for and protect their minor children. (*People v. Heitzman*, *supra*, 9 Cal.4th at p. 198.) Appellant had been in an eight-year relationship with Michelle and had regular contact with their son. On the day of the offense, he demanded that Michelle give J. to him. Appellant attempts to obfuscate the issue by arguing that he did not have legal custody of his son, as that term is defined in the Family Code. His argument

is irrelevant. Appellant cannot take refuge in the Family Code to escape criminal liability under the child abuse statute.

*Jury Question Concerning Definition of "Care or Custody"*

During deliberations, the jury sent the trial court a note stating, "Please provide us with a legal definition of 'care or custody.'" The court conferred with counsel and indicated that it would respond with the language in *Cochran* that "there's no special meaning to the terms care and custody beyond the plain meaning of the terms themselves. Care and custody includes a willingness to assume duties correspondent to the role of a caregiver." Defense counsel objected and requested the court to omit the second sentence of its proposed response, but the court refused.[3]

Appellant argues that the first sentence indicates the words should be used in their ordinary meaning, but the second sentence is a legal definition. He claims the trial court confused the jury by giving "conflicting" definitions. We consider it unlikely that the jury required assistance in defining the term "care." We can only surmise that it may have been struggling with the term "custody," as it relates to caregiving versus court-ordered custody. Given that the instruction is stated in the conjunctive, we think the language in *Cochran* provided sufficient guidance to the jury in reaching its verdict.

*Instructional Error*

*1) Use of CALJIC Instructions*

Appellant argues that the trial court erred by using the CALJIC, rather than CALCRIM, pattern jury instructions. While counsel and the court were discussing jury instructions, the court indicated it wished to use CALJIC instructions. The district attorney stated, "If we are going to be using the CALJICs, as long as there's a stipulation that that is fine in lieu of the CALCRIM just for appellate purposes may or may not be an issue, if you can stipulate that CALJICs is fine." Defense counsel responded, "So stipulate[d]." The

[3] The court's written response read, "There is no special meaning to the terms 'care or custody' beyond the plain meaning of the words themselves. 'Care or custody' includes a willingness to assume duties correspondent to the role of a caregiver." The trial court omitted the language that the terminology "do[es] not imply a familial relationship." Appellant does not allege error. We assume the omission was intentional since appellant is a family member of the victim.

trial court indicated that it did not believe a stipulation was necessary, but would use the CALJIC instructions.

Trial judges are strongly encouraged to use the new Judicial Council instructions unless he or she finds that a different instruction would more accurately state the law and be understood by jurors. (Cal. Rules of Court, rule 2.1050(e).) "The goal of these instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror." (*Id.*, rule 2.1050(a).) Here, the trial court indicated its wish to use CALJIC instructions, and the prosecutor and defense counsel stipulated to the use of those instructions. There was no error.

*2) Definitions of Criminal Negligence*

A trial court's instruction is a question of law which is subject to our independent review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) The trial court instructed the jury with CALJIC No. 16.170 (child abuse/neglect/endangerment misdemeanor),[4] which is based on the language of section 273a, subdivision (b). This instruction was replaced in 2006 by the Judicial Council of California Criminal Jury Instructions as CALCRIM No. 823.[5]

---

[4] CALJIC No. 16.170 defines criminal negligence as "' . . . negligent conduct which is aggravated, reckless or flagrant and which is such a departure from the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for [human life] [danger to human life] or to constitute indifference to the consequences of that conduct. The facts must be such that the consequences of the negligent conduct could reasonabl[y] have been foreseen and it must appear that the [death] [danger to human life] was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of aggravated, reckless or flagrantly negligent conduct."

[5] CALCRIM No. 823 states, "*Criminal Negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily harm; [¶] AND [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act."

Appellant argues that CALCRIM No. 823 required greater proof of criminal negligence than its CALJIC counterpart.[6] He contends that, had the jury been instructed with CALCRIM No. 823, "there is absolutely no evidence of any act creating a high risk of death or great bodily harm." Appellant acknowledges that he did not object to the language of the instruction below, but argues that the error affects his substantial rights and may therefore be reviewed on appeal. (§ 1259.)

It appears that appellant has waived his objection. Nevertheless, we examine the instructions to determine if there is merit to his argument. Both instructions require a showing of reckless conduct that creates a reasonably foreseeable risk of death or a danger to human life. Both contain the additional language describing negligence as conduct that differs from that of a reasonable person and constitutes a disregard for human life or to the consequences of that conduct. Had the court given CALCRIM No. 823, there was ample evidence from which the jury could have found that appellant acted with criminal negligence. By striking a person holding a child, he acted recklessly and created a high risk of bodily harm; and a reasonable person would have known that this conduct would have created such a risk.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

[6] We note that, although the language of section 273a does not require a showing of criminal negligence, numerous cases involving indirect abuse have interpreted the statute as imposing such a requirement. (See *People v. Valdez* (2002) 27 Cal.4th 778, 784.)

Glen M. Reiser, Judge

Superior Court County of Ventura

---

Mark Brown, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Bill Lockyer, Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen, Supervising Deputy Attorney General, Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.